IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 24, 2006 Session

STATE OF TENNESSEE v. ROBERT LINDER

Appeal from the Circuit Court for Blount County
No. C-14001 D. Kelly Thomas, Jr., Judge

No. E2004-02848-CCA-R3-CD - Filed September 22, 2006

The defendant, Robert Linder, was convicted of especially aggravated sexual exploitation of a minor following a bench trial before the Blount County Circuit Court. The trial court imposed an incarcerative sentence of 12 years. On appeal, he claims that evidence was seized from his residence in violation of Rule 41 of the Tennessee Rules of Criminal Procedure. He also challenges the length of his sentence as excessive. After our review of the record and the parties' briefs, we affirm the defendant's conviction but modify his sentence.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed, as Modified.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, J., joined. GARY R. WADE, P.J., not participating.

Julie A. Rice, Knoxville, Tennessee (on appeal); Raymond Mack Garner, District Public Defender; and Stacey Nordquist, Assistant District Public Defender (at trial), for the Appellant, Robert Linder.

Paul G. Summers, Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; James Michael Taylor, District Attorney General; and Robert Headrick, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

On January 10, 2002, Blount County law enforcement officers executed a warrant to search the defendant's residence located at 2001 Wayne Circle in Maryville. The officers were investigating allegations that the defendant had taken pictures and videotaped his four-year-old step-granddaughter, LE, engaging in sexual activity.[1] The officers seized five computers and other assorted computer hardware and software items. Pretrial, the defense moved to suppress the evidence seized from the home on the grounds that the officers failed to comply with Rule 41 of the

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[1] It is the policy of this court to refer to victims of sexual offenses by their initials.

Tennessee Rules of Criminal Procedure and Tennessee Code Annotated section 39-17-1007. The trial court conducted an evidentiary suppression hearing and denied the defendant's motion.

Thereafter, the defendant was tried on September 9, 2004, by the trial court sitting without a jury, and the court found him guilty of the charged offense of especially aggravated sexual exploitation of a minor, a Class B felony. *See* Tenn. Code Ann. § 39-17-1005 (2003). At a separate hearing on November 8, 2004, the trial court sentenced the defendant to a 12-year term of imprisonment, as a Range I standard offender. On appeal, the defendant argues that the trial court erred in denying his motion to suppress, and he challenges his sentence as excessive.

The defendant does not contest the sufficiency of the convicting evidence presented at his bench trial, and we need not dwell at length on the proof introduced. The state presented the testimony of Anthony Guida, a former internet crimes investigator for the Knoxville Police Department, and Tiffany Dailey, the victim's mother. Ms. Dailey testified that LE's date of birth is July 19, 1997. In early January 2002, Ms. Dailey left LE with the defendant and his wife for most of the day. Ms. Dailey was shown and identified state's exhibit 2 as a photograph of LE taken when she was four years old.

Mr. Guida was contacted by Assistant District Attorney John Bobo who requested a "forensic examination" of several computers and digital media seized from the defendant's residence. Mr. Guida extracted a video of LE and numerous still images from the video. He described pictures two through 20 as individual screen shots taken from the video, whereas the first and last pictures came directly from a digital camera; those photographs were designated as DE-23 and DE-24. DE-23 and DE-24 were both taken with a Sony movie camera within 30 to 45 seconds of each other, indicating they were taken in succession from the same camera. For the record, Mr. Guida described DE-23 as a "child exposing her genitalia, sitting on a chair, raising her shirt and staring at a camera." He described DE-24 as showing a vagina and "what appears to be a finger moving the underwear aside."

The defendant did not testify or offer any other proof.

The trial court found that the state had proven beyond a reasonable doubt that the defendant was guilty of especially aggravated sexual exploitation of a minor. Relevant to this case, a person commits especially aggravated sexual exploitation of a minor who "knowingly promote[s], . . . use[s], . . . or permit[s] a minor to participate in the performance or in the production of material which includes the minor engaging in . . . sexual activity." Tenn. Code Ann. § 39-17-1005(a)(1) (2003). The trial court noted that it was undisputed that the defendant produced the material and that LE was a minor at the time. Regarding the disputed issue whether the minor was engaging in sexual activity, the trial court concluded that the state had proven that element of the offense based on the lascivious exhibition of the minor's genitals and pubic area, the striptease nature of the poses, and the intent or design to elicit a sexual response in the viewer.

I. SUPPRESSION MOTION

The hearing on the defendant's suppression motion was held in stages at three different times. On June 3 and 4, 2003, the trial court received testimony and exhibits regarding the defendant's complaint that the requirements of Tennessee Rule of Criminal Procedure 41(c) were not observed,[2] which provided in relevant part:

> The magistrate shall prepare an original and two exact copies of the search warrant, one of which shall be kept by the magistrate as part of his or her official records, and one of which shall be left with the person or persons on whom the search warrant is served. . . . Failure of the magistrate to make said original and two copies of the search warrant or failure to endorse thereon the date and time of issuance and the name of the officer to whom issued, or the failure of the serving officer where possible to leave a copy with the person or persons on whom the search warrant is being served, shall make any search conducted under said search warrant an illegal search and any seizure thereunder an illegal seizure.

Tenn. R. Crim. P. 41 (amended 2006).

Maryville Detective Sergeant Sharon Moore was the lead investigator who obtained the warrant to search the defendant's residence. Her involvement began on January 9, 2002, when she interviewed the defendant's granddaughter at Blount Memorial Hospital. The victim told Detective Moore that her grandfather, "Grumpy," had touched her "cookie" and that he had revealed his "winker" to her and asked her to kiss it.

The following day, Investigator John Cronan and Detective Hess spoke with the defendant at his residence. They noticed screen-saver photographs of the victim on the defendant's computer, depicting the victim in "Jon Benet type attire, dressy . . . kind of with a seductive look." The victim's mother also contacted Detective Moore and related that the victim claimed that "Grumpy had taken photos of her 'cookie.'" Based upon the information developed to date, Detective Moore prepared a search warrant affidavit, and she, Investigator Cronan, and District Attorney General John Bobo, presented the affidavit and warrant that night to Judge Brewer at his residence. Detective Moore "believe[d]" that she took three copies of the paperwork to Judge Brewer. Judge Brewer read the search warrant affidavit, and he dated and signed an original and two copies of the search warrant. Detective Moore testified that she left the original affidavit and warrant, which had been labeled "original," with Judge Brewer and took the copies to the defendant's residence, where one copy was left with the defendant.

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[2] Effective July 1, 2006, a "reformatted" version of the Tennessee Rules of Criminal Procedure replaced the former criminal procedure rules. Compiler's Notes, Tenn. R. Crim. P. (2006). For purposes of this case, our analysis is confined to former Criminal Procedure Rule 41, which was in effect at the time the search warrant for the defendant's residence was executed.

The defendant's wife admitted the officers inside the residence. The defendant, who had been in the bedroom, rose and went into the kitchen. Detective Moore and Investigator Cronan spoke with the defendant and requested that he sign a consent to search form. The defendant declined, and the officers explained that they had a search warrant and would be going through the residence. Detective Moore did not think that she read the search warrant to the defendant. Numerous items were seized from the defendant's residence, primarily from the downstairs area, and an inventory was prepared. Detective Moore said that on Wednesday of the following week, she prepared a "return" and delivered it and the inventory to Judge Brewer on January 16.

The state called Judge William Brewer as a witness, and he confirmed that Detective Moore, Detective Cronan, and Assistant District Attorney Bobo drove to his residence to have him review and approve a search warrant for the defendant's residence. Judge Brewer recalled signing three copies of the search warrant; he kept one signed copy in his office files, and he gave the other two copies to Detective Moore. Regarding the practice for handling search warrant returns and inventories, Judge Brewer described two practices. Under the first practice, the executing officer returns to the judge one of the signed copies with the return, which the judge will sign, and either the judge or his secretary will take the records to the clerk's office. Under the second practice, the executing officer will deliver the warrant and the return to the clerk's office which then will contact the judge to sign the return. The judge testified that if he received a return without the accompanying search warrant he would not sign the return.

The parties stipulated that the clerk's office maintained a locked file for search warrants. The search warrant in this case labeled "original," the affidavit, the return, and a three-page inventory were inside that file. The file log did not indicate who in the clerk's office received and filed the records in this case.

The defendant's wife, Leslie Linder, testified that she and the defendant lived at 2001 Wayne Circle in Maryville. On January 11, at approximately 11:00 p.m., she answered the door. Four officers were at the door, and they asked to speak with the defendant. The search warrant was not mentioned at that time. Ms. Linder, accompanied by the four officers, went into the dining room. Ms. Linder later learned that Detective Moore entered the residence from the downstairs area. The officer told the couple that they had a warrant, but Ms. Linder denied that the officers showed them the warrant or read from it. At one point, however, she and the defendant were separated, and Ms. Linder was in the spare bedroom watching Detective Moore search through drawers. The only paper that Ms. Linder could identify seeing was the "Miranda rights" form that one of the male detectives read to the defendant. Ms. Linder estimated that the officers were in the house until approximately 3:00 a.m. She testified that they did not leave the search warrant at the house.

The defendant testified that his wife awakened him shortly after 11:00 p.m. on January 11 and said that police officers wanted to see him. The defendant went into the dining room with his wife and Officers Cronan and Hess. Another officer went into the living room, and one officer stayed in the kitchen. The defendant testified that he did not see Detective Moore until "at least half an hour later." The defendant denied that Detective Moore ever reviewed the search

warrant with him or left a copy of the warrant or inventory at the residence. Other officers present did advise him that his computers would be searched after he declined to grant permission for them to search. The only paper that the defendant signed was a rights acknowledgment.

The state recalled Detective Moore, and she insisted that she was with the other officers when Ms. Linder answered the front door. Detective Moore said that she followed Ms. Linder upstairs and waited while Ms. Linder went to the restroom. Thereafter, she, the Linders, and Detectives Hess and Cronan went into the kitchen. Detective Moore did not recall if the patrol officers were in the kitchen or another part of the residence. Detective Cronan began by reading the defendant his rights and having the defendant sign a waiver. Detectives Moore and Cronan signed the waiver as witnesses. Detective Moore said that she also was present when the defendant refused to consent to the search, after which Detective Cronan explained to the defendant that they would be executing a search warrant, described the items they were seeking, and presented a copy of the search warrant to the defendant.

The following week, after the officers had prepared formal property receipts, the defendant received an inventory of the items that had been seized. When Detective Moore requested that Judge Brewer sign and date the return for the executed search warrant, she recalled having the return, the property receipts, and photographs of the seized items; she did not remember if the search warrant was among the items presented to the judge. Detective Moore admitted that she was incorrect when she testified previously that she presented three copies of the search warrant to Judge Brewer; upon further investigation, Detective Moore determined that four copies of the warrant existed. Judge Brewer retained one copy, the defendant received a copy, Detective Moore kept a copy for her case file, and the fourth copy was presented to Judge Brewer with the executed return. Detective Moore also acknowledged that her previous testimony about the search warrant labeled "original" having been left with the judge conflicted with Judge Brewer's testimony.

The defendant testified in rebuttal that after he executed the rights waiver, he did not see either Detective Cronan or Detective Moore sign the form as witnesses.

Concerning whether the requirements of Criminal Procedure Rule 41 were met, the trial court ruled,

> I think that the preponderance of the evidence is . . . that Detective Moore was not lying or mistaken about what happened in the dining room that night. . . . [I]n spite of the fact that she was mistaken about how many warrants were taken to Judge Brewer's home, everything else that went on there in the dining room – what happened, what was explained, the Miranda warnings, everything except giving [the defendant] a copy of the warrant – everyone agrees upon, except the fact that the Linders both say that she wasn't there.
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> And I think it's established that she was there, by the Miranda waiver and the fact that she signed off on it . . . and dated it and wrote

> the time on it, the time being 11:00, 2300, which was just the next minute or so after the Permission to Search was also signed – not signed, I mean. . . .
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> That, in my mind, establishes that she was there. And it doesn't strain my imagination to think that someone that was awakened at 11:00 at night and invaded by police officers . . . could be mistaken about some things. . . .
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> . . . I think [the] provisions of Rule 41 . . . were met, the major issue being leaving a copy, where possible with the person or persons on whom the warrant was being served. And I think that was done.

On appeal, the defendant attacks the trial court's ruling on the grounds that Detective Moore's testimony was not believable, was riddled with inconsistencies, and should not have been credited by the trial court. We disagree and affirm the trial court's ruling pursuant to well-settled rules of appellate review of suppression motions and rulings.

When evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, the court on appeal must uphold the trial court's findings of fact unless the evidence preponderates otherwise. *See State v. Ross*, 49 S.W.3d 833, 839 (Tenn. 2001); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). In reviewing these factual findings, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. As such, "[t]he prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). Our review of a trial court's application of law to the facts, however, is conducted under a de novo standard of review. *See Ross*, 49 S.W.3d at 839; *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001).

We are not persuaded that the evidence adduced at the suppression hearings preponderates against the trial court's fact finding. The trial court was confronted with conflicting testimony, with the defendant and his wife insisting that they never received a copy of the search warrant. Resolution of such conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The trial court in this case examined all of the circumstances surrounding execution of the search warrant, including the rights waiver, the defendant's refusal to consent to the search, and Detective Moore's testimony that she was present when Detective Cronan explained to the defendant what items were being sought and presented a copy of the search warrant to the defendant. The defendant is critical that the state did not offer testimony from any other law enforcement personnel who were present when the warrant was executed. To be sure, additional testimony may have facilitated the trial court's fact-finding determinations, but we cannot say that the trial court's factual

determinations were devoid of testimonial support or that the evidence preponderates against the ruling.

II. SENTENCING

The defendant's last complaint is that his sentence is excessive. The trial court imposed a maximum 12-year sentence for his Class B felony conviction of especially aggravated sexual exploitation of a minor. *See* Tenn. Code Ann. §§ 39-17-1005, 40-35-112(a)(2) (2003) (establishing a minimum of eight years and a maximum of 12 years for Class B offenses, Range I). The defendant advocates a minimum, eight-year sentence. On appeal, he argues that the trial court misapplied one enhancement factor and failed to apply "appropriate" mitigating factors.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The sentencing court must consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b) & -35-103(5) (2003).[3]

The trial court found and applied the following enhancement factors to the defendant's conviction: (5) the victim was particularly vulnerable because of age, and (16) the

[3] Effective June 7, 2005, Tennessee Code Annotated sections 40-35-114 and 40-35-210 were rewritten in their entirety. *See* 2005 Tenn. Pub. Acts, ch. 353, §§ 5, 6. These sections were replaced with language rendering the enhancement factors advisory only and abandoning a statutory minimum sentence. *See* Tenn. Code Ann. §§ 40-35-114 (2005) ("the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence"), -35-210(c) ("In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines.").

defendant abused a position of private trust. *See* Tenn. Code Ann. § 40-35-114(5), (16) (2003).[4] The trial court did not mention any mitigating sentencing factors.

The defendant admits on appeal that the trial court appropriately considered and applied enhancement factor (16) that the defendant abused a position of private trust. He insists, however, that the state failed to demonstrate that the victim was particularly vulnerable because of her age.

Enhancement factor (5) may be applied to enhance a sentence for a sexual offense committed against a minor notwithstanding that the age of the minor was used to elevate the crime to an aggravated offense. *See State v. Adams*, 864 S.W.2d 31, 35 (Tenn. 1993). This factor requires a finding that the victim was particularly vulnerable to the offense because, as relevant here, of the victim's age. *See* Tenn. Code Ann. § 40-35-114(5) (2003). "A victim's youth does not necessarily equate with vulnerability, however." *State v. Lewis*, 44 S.W.3d 501, 505 (Tenn. 2001) (citing *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997)). The *Lewis* court stated,

> The State is required to proffer evidence in addition to the victim's age to establish particular vulnerability; however, that evidence "need not be extensive." *Poole*, 945 S.W.2d at 97. Also, a court may consider the natural vulnerabilities attendant to the extreme ends of the aging spectrum by giving "additional weight . . . to the age of the victim in those cases where a victim is extremely young or old."

Lewis, 44 S.W.3d at 505.

This case involved an extremely young victim, four years old. When investigating officers interviewed the defendant after his residence was searched and after incriminating information had been retrieved from the defendant's computers, the defendant in this case gave a statement to the investigating officers. The record before us contains a videotape of that statement in which the defendant admits that he photographed and videotaped the victim on January 9, between 1:00 and 3:00 p.m. The defendant's wife was not present at the time, and he was alone with the victim in the downstairs area of the residence for that two-hour interval. This evidence, in our opinion, is sufficient to demonstrate that the victim was incapable of resisting or summoning help. *See Adams*, 864 S.W.2d at 35 (vulnerability enhancement relates more to natural physical and mental

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[4] Tennessee Code Annotated section 40-35-114, as amended in 2002 by Public Act 849, § 2(c), effective July 4, 2002, added one enhancement factor and subsequently renumbered all of the original enhancement factors in the statute. Thus, for the time period during which the defendant's offenses were committed and during which he was sentenced, the enhancement factor pertaining to particularly vulnerable victims was subsection (5), and the enhancement factor for abuse of a private-trust position was subsection (16). *See* Tenn.Code Ann. § 40-35-114(5), (16) (2003). We note that the legislature has, again, recently amended and renumbered the enhancement factors, *see* Tenn. Code Ann. § 40-35-114 (Supp. 2005), but these changes became effective for criminal offenses committed on or after June 7, 2005, and do not apply in this case.

limitations of victim, such as being incapable of resisting, summoning help, or testifying against perpetrator.)

Regarding sentencing mitigation, the trial court did not place in the record its consideration of possibly relevant factors. The defense did not file any written notice of suggested mitigating factors; however, the presentence report put the court on notice regarding the defendant's background and lack of prior criminal record. At sentencing, the defense mentioned the absence of a prior history of any kind of arrests, steady employment history, the defendant's age of 65 years old, his prior military service, and the lack of serious bodily injury of the victim.

The trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. *See* Tenn. Code Ann. § 40-35-210(f) (2003); *State v. Jones*, 883 S.W.2d 597, 599 (Tenn. 1994). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e) (2003). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the sentencing act and its findings are adequately supported by the record. *See id*. § 40-35-210 Sentencing Commission Comments. In this case, our review will be de novo upon the record. *See State v. Grissom*, 956 S.W.2d 514, 518 (Tenn. Crim. App. 1997).

The defendant's lack of prior criminal history qualifies as a mitigating sentencing factor. *See State v. Gutierrez*, 920 S.W.3d 641, 646 (Tenn. 1999). Furthermore, we accord slight mitigating weight to the defendant's employment history, age, and prior military service. We reject, however, application of mitigating factor (1), that the defendant's criminal conduct neither caused nor threatened serious bodily injury. The record reflects that the defendant's conduct has had an substantial negative impact on the victim's social and mental development, including nightmares, fear of men, and fear of having her picture taken. Psychological and emotional injuries qualify as "serious bodily injury" in this context. *See State v. Jonathan D. Rosenbalm*, No. E2002-00324-CCA-R3-CD (Tenn. Crim. App., Knoxville, Dec. 9, 2002); *State v. Smith*, 910 S.W.2d 457, 461 (Tenn. Crim. App. 1995).

On balance, we believe that enhancement factors (5) and (16) fully justify increasing the defendant's sentence from eight to 12 years but that the applied mitigating factors justify a reduction of one year. Thus, we modify the sentence to 11 years.

III. CONCLUSION

After a thorough review of the record, we conclude that the defendant's suppression motion was properly denied. Additionally, we hold that the combination of enhancement and mitigating factors result in a sentence of 11 years. Therefore, we affirm the judgment of conviction and modify the length of the sentence imposed to 11 years..

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JAMES CURWOOD WITT, JR., JUDGE